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# State of Utah v. Ronald R. Koury : Reply Brief

Utah Court of Appeals

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Wayne B. Watson; Watson, Scribner and Burrows; Attorney for Appellant.

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UTAH COURT OF APPEALS  
BRIEF

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900456 CA

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff - Respondent,	:	
vs.	:	Case No. 900456-CA
RONALD R. KOURY,	:	Category No. 2
Defendant - Appellant.	:	

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REPLY BREIF OF DEFENDANT - APPELLANT

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FILED

MAY 2 1991

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff - Respondent,	:	
vs.	:	Case No. 900456-CA
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IN THE UTAH COURT OF APPEALS

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RONALD R. KOURY,	:	Category No. 2
Defendant - Appellant.	:	

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**STATEMENT OF JURISDICTION**

As it relates to this Reply Brief of Defendant - Appellant, the jurisdiction of the Utah Court of Appeals is the same as that set forth in Defendant - Appellant's original brief.

**STATEMENT OF ISSUES ON APPEAL**

I. Did the District Court err in denying Defendant's Motion to Suppress, based upon the unlawful search and seizure violative of the protections provided by the Fourth and Fourteenth Amendments and Article I, Section 14 of the Utah State Constitution?

II. Did the District Court err in failing to find an agency relationship, where law enforcement officials had knowledge of and acquiesced to an informant's entry into and search of a person's home?

III. Did the District Court err in failing to extend the protections of the Fourth and Fourteenth Amendments and Article I, Section 14 of the Utah State Constitution, against unlawful searches and seizures, carried out vicariously by law enforcement officials?

### STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Statement of the Case and Statement of the Facts applicable to this Reply Brief were sufficiently set out in the original brief of Appellant Ronald Koury. Appellant Koury would, however, point out that Appellee, the State of Utah, stated in its Statement of Facts that Horvath and Cordner never spoke again after an investigation was begun. The State cites to the record at 183-184. Horvath stated at lines 12 and 13 at 184 that after the investigation began "Dennis would not speak to me as a friend or otherwise." However, the Record at 196-197 demonstrates that Horvath changed his story on cross-examination. He there stated that he did in fact have daily contact with Cordner.

### SUMMARY OF ARGUMENT

In its Brief, the State of Utah asserts that Defendant - Appellant Ronald Koury is raising an issue on appeal that was not raised in the trial court. The State has obviously misunderstood or misconstrued Koury's Brief. This appeal deals with the failure of the District Court to recognize an agency relationship between Horvath and local law enforcement officials. The issue of Horvath's agency was definitely raised at the level of the trial court. Numerous references and arguments to that end were made by Koury. If an agency relationship is found, then all subsequent evidence must be suppressed based upon the "fruit of the poisonous tree" doctrine. The suppression itself is not the entire basis of this appeal, the issue of agency is crucial to the issue of suppression and as such was raised in the trial court.

## ARGUMENT

This appeal deals with the necessity of suppression of evidence obtained by law enforcement officials as a result of certain illegal searches and seizures, carried out by an agent of law enforcement and law enforcement officials.

### **I. THIS APPEAL DEALS WITH THE AGENCY STATUS OF THE INFORMANT HORVATH WHICH WAS IN FACT RAISED AT THE TRIAL LEVEL**

The State seeks to "cubby-hole" this appeal to the evidence seized by Horvath, when in fact the appeal deals with the overall agency status of Horvath. If the trial court erred as herein alleged by Koury, and Horvath is considered an agent, all evidence obtained from any and all searches conducted by Horvath as well as law enforcement as a result of Horvath's illegal and unauthorized involvement must be suppressed, not just the evidence gathered by Horvath. Thus, at this point, it is irrelevant whether the state seeks to introduce the evidence gathered by Horvath. The central theme of this appeal is to determine the agency status of Horvath. If Horvath is found to be an agent, then and only then does the issue of suppression of evidence come before the court. There is ample support on the record for Koury's assertions that Horvath's agency status was in fact challenged in the trial court. A review of Koury's Memorandum in Support of Motion to Suppress (R. at 90 through 96) will reveal that this agency status and search and seizure related thereto was in fact raised in the Motion to Suppress. In further support of Koury's claim that Horvath's agency and illegal



search and seizure was in fact raised at the trial level is the following language used by Koury in his Memorandum in Support:

Horvath, as an agent of the police, was prohibited from entering Defendant Koury's house without a warrant. Horvath entered Defendant's house several times after contacting the police with information regarding drug trafficking and distribution, and evidence obtained through Horvath after April 4, 1989 should be suppressed. (R. at 94 and 95 emphasis added).

The foregoing demonstrates that Koury attempted to show that Horvath was an agent. It demonstrates that Koury attempted to suppress all even obtained as a result of Horvath's mere involvement, based upon his illegal searches and seizures as an agent of law enforcement.

**II. HORVATH'S STATUS AS AN AGENT OF LAW  
ENFORCEMENT TAINTS ALL EVIDENCE RECOVERED  
AS A RESULT OF HIS ILLEGAL SEARCHES AND  
SEIZURES PURSUANT TO THE FRUIT OF THE  
POISONOUS TREE DOCTRINE**

An endless number of cases have dealt with the fruit of the poisonous tree cases. By way of illustration, United States v. Vaughan, 718 F.2d 332 (9th Cir. Cal. 1983), held that if a warrant is invalid because the affidavit in support of the warrant relied significantly on illegally seized evidence (or on illegal searches in the instant case), it follows that any evidence seized pursuant to it must also be suppressed. This case demonstrates the doctrine of the fruit of the poisonous tree. As it relates to the instant case, Horvath's illegal and unauthorized searches and seizures taint not only the substances he removed from the Koury home, but all evidence obtained, including that sought to be introduced by the State, as a result of information from

Horvath's illegal searches and seizures.

Additionally, Lucas v. State, 704 P.2d 1141 (Okla. 1985), held that a gun and certain drug paraphernalia, seized from the defendant's residence, even though obtained pursuant to a valid search warrant, was discovered by the exploitation of an illegal search and was fruit of the poisonous tree and as such it must be suppressed. This is the same basic doctrine with a slight factual change. The point is that not only is the evidence which Horvath personally seized subject to suppression, but so is the evidence seized by law enforcement as a result of Horvath's illegal involvement.

#### CONCLUSION

Accordingly, the State's argument that the issue on appeal is not properly before the Court is erroneously based and should be so recognized. The issue on appeal of Horvath's agency status and the subsequent issue of the suppression of evidence related to Horvath's actions were in fact properly raised at the trial court level. Horvath was an agent of law enforcement as evidenced by his continued entrance into the home of an alleged would-be assailant and his "daily" contact with law enforcement in that regard.

Respectfully submitted this 29 day of April, 1991.

  
WAYNE B. WATSON, P.C.  
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that four true and correct copies of the foregoing Reply Brief for Appellant, with postage prepaid thereon, were mailed to the office of R. Paul Van Dam, Utah Attorney General and Charlene Barlow, Assistant Attorney General, Attorneys for Appellee, 236 State Capitol, Salt Lake City, Utah 84114, this 29 day of April, 1991.

A handwritten signature in cursive script, appearing to read "Wayne B. Watson", is written over a horizontal line.

WAYNE B. WATSON, P.C.

## **ADDENDUM**

U.S. CONST. amend. IV.

[Unreasonable searches and seizures]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UTAH CONST. art. I, §14.

[Unreasonable searches forbidden -- Issuance of warrant]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

---

STATE OF UTAH,	:	MEMORANDUM OF POINTS AND
	:	AUTHORITIES IN SUPPORT OF
Plaintiff,	:	MOTION TO SUPPRESS
vs.	:	
RONALD R. KOURY,	:	Civil No. 891400352
Defendant.	:	(Judge Christensen)

---

COMES NOW Defendant, by and through counsel of record, and pursuant to Rule 4-501 of the Utah Code of Judicial Administration hereby submits the Point and Authorities in Support of the Motion to Suppress as follows:

MATERIAL FACTS

1. On or about April 4, 1989, informant Joseph Horvath spoke with officers Dennis Kordner and Gary L. Caldwell regarding threats he had been receiving from Defendant, Ron Koury. At this time, he also mentioned the Defendant's name in connection with distributing illegal narcotics.

2. In Officer Caldwell's Probable Cause Affidavit, he states that Officer Kordner and Horvath were in daily contact since April 4, 1989, concerning this case.

on Koury's telephone number as a result of the information given to him by Horvath to keep track of all phone calls made to or from the house, in order to keep track of Koury's whereabouts.

4. On May 1, 1989, Horvath went to Koury's house to check the windows and feed the animals. In one bedroom, he observed what he thought to be residue from a line of cocaine, and in another room in the house, he observed what he thought to be cocaine paraphernalia. Horvath went to the police with this information.

5. Horvath entered Koury's house at least two more times between May 1 and May 8, 1989. The warrant to search Koury's residence was issued on May 8, 1989.

### ARGUMENT

I. Mr. Horvath was acting as an agent of the police.

Black's Law Dictionary, Fifth Edition, defines "agent" as follows:

One who represents and acts for another under the contract or relation or agency. One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it.

Mr. Horvath told the police, specifically Officer Caldwell and Officer Kordner, on April 4, 1989, that the Defendant was trafficking and distributing cocaine. Mr. Horvath had accurately informed police in the past and was considered, by Caldwell, to be a reliable informant. The police were in constant contact with Mr. Horvath concerning the whereabouts and activities of the Defendant from April 4, 1989, until the date the search warrant was issued. Mr. Horvath was acting under



the authority of the police in keeping track of Defendant and looking through the rooms in Defendant's house. If this were not the situation, why then would the police and Mr. Horvath be in daily contact? Police knew that Defendant had asked Horvath to keep an eye on his house while he was out of town, and took advantage of this to get Horvath to search through the house for evidence of the alleged trafficking and distribution.

On May 1, 1989, while Mr. Horvath was supposedly looking through Defendant's house to check the windows, Horvath observed cocaine residue and paraphernalia and told the police what he had seen. Horvath also entered the house at least two more times after May 1, 1989, to "check the windows and feed Defendant's pets." The police knew that Horvath had access to Defendant's house and, therefore, used Horvath, as an agent, to do an illegal search in order to obtain probable cause for a legal search warrant.

II. An informant's information must be considered reliable and apprised of the underlying facts and circumstances which show probable cause.

The Court in Aguilar v. Texas, 378 U.S. 108 (1964), established a two-pronged standard in obtaining a search warrant:

1. The standard of reasonableness for obtaining a search warrant is the same under the Fourth and Fourteenth Amendments.
2. Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was creditable or his information reliable.

Horvath first informed the police of the alleged wrongdoings of the Defendant on April 4, 1989. In a Preliminary Hearing, held on September 13, 1989, Horvath told the Court that he and Koury were close friends and were partners in a body shop business from June, 1987, to December, 1988. Horvath stated that he and the Defendant had several arguments. Horvath also stated that Defendant Koury "threatened mine and my wife and kids' life, I was concerned that he was going to inflict bodily harm on myself and my family . . . this guy is a mental case." United States v. Harris, 403 U.S. 573 (1971), states:

Recent case law has acknowledged that a different rationale exists for establishing the reliability of named citizen informers as opposed to unnamed police informer, who are frequently criminals. Those in the latter category often proffer information in exchange for some concession, payment, or simply out of revenge against the subject; under such circumstances, it is proper to demand some evidence of their credibility or reliability.

Horvath had some personal interest in Defendant's arrest, as he had been allegedly threatened many times and was worried for his and his family's lives. In their affidavit, the police testified that Horvath was a reliable informant. United States v. Harris, 403 U.S. 574 (1971) states that:

reliability of the informant was not necessary, since the inquiry as to probable cause was whether the informer's present information was truthful or reliable.

In light of Horvath's relationship to Defendant, thoughts of his own safety and gain may have influenced his information to be unreliable and given him motive to enter Koury's house to aid the police in their investigation. Horvath's motive being to help the police catch Koury

before Koury carried out any of his threats.

In addition, the fact that Horvath was an unnamed police informant, with possible ulterior motives, his information should be held to the higher level of scrutiny of United States v. Harris.

III. An acting agent of the police is the equivalent of an employee of the police, which would require the agent to obtain a search warrant before entering a suspect's house.

In Payton v. N.Y., 445 U.S. 573 (1980), the Court held that the Fourth Amendment prohibits the police from entering a suspect's home without a warrant to make a routine arrest. The Court reasoned that these searches and seizures inside a home without a warrant are presumptively unreasonable, when the purpose is to search or seize an object or a person. Amendment IV of the Constitution of the United States states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This right is applicable to the states through the Fourteenth Amendment.

United States v. Espinosa, 782 F.2d 888, 890 (10th Cir. 1986)

states that:

The Fourth Amendment does not protect against all searches and seizures, but rather against those which are unreasonable... the protections of the Fourth Amendment, however, apply only to governmental action; a search or seizure, even if unreasonable, performed by a private person not acting as a government agent or in concert with a government official is not within the scope of the Fourth Amendment.

Horvath, as an agent of the police, was prohibited from entering

Defendant Koury's house without a warrant. Horvath entered Defendant's house several times after contacting the police with information regarding drug trafficking and distribution, and evidence obtained through Horvath after April 4, 1989 should be suppressed. Horvath continued entering the home and making observations on behalf of the police, thus demonstrating an agency relationship. Based upon the knowledge the police had of the relationship between Horvath and the Defendant, they took advantage of the situation by having Horvath conduct searches they could not legally conduct themselves. Such a relationship must be considered one of agency due to the severe results upon Fourth Amendment protections were the Court to rule otherwise.

Horvath claims to be in fear for his own life and the lives of his wife and children, but asks the Court to believe that he continued to enter the house and feed the animals of his friend. It seems somewhat illogical to continue with such activities, when one is in fear for one's life. As an agent, Mr. Horvath would be able to implicate defendant in an action such as the present if he were to continue to provide information and surveillance to the police, which is exactly what he did.

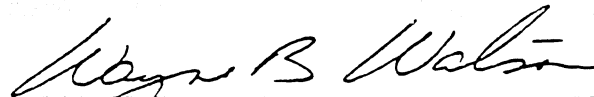
When the totality of the circumstances are analyzed, it is obvious that Horvath was an informant, he was acting at police suggestion, motivation, request, or the like. He informed police and continued to do so up to the time of arrest. It is a smear upon Fourth Amendment protections to allow the police to carry on an investigation through an informal agency relationship, obtaining evidence and subsequent warrant

and arrest, illegally.

### CONCLUSION

The police are prohibited by the Fourth Amendment from searching a person's home without a warrant. Horvath, as an agent of the police, is considered an extension of that body, and is bound by the same laws and limitations as the police. Horvath searched Defendant's house without a search warrant, under the supervision of the police, in violation of the Defendant's Fourth Amendment rights. Therefore, the evidence found during any such searches, should be suppressed, as it was obtained in violation of Defendant's rights. To allow the police to act in such a manner as it violates the state and federal constitutions, would be a grave injustice.

DATED this 22 day of June, 1990.

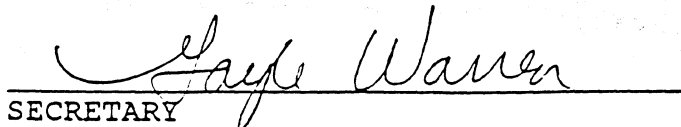


WAYNE B. WATSON, P.C.  
Attorney for Defendant

### HAND DELIVERY CERTIFICATE

I hereby certify that I hand delivered a true and correct copy of the foregoing, to the following on the 22 day of June, 1990:

Sherry Ragan  
Deputy Utah County Attorney  
100 East Center, Suite 2100  
Provo, Utah 84606

  
SECRETARY

1 A Okay. So Officer Cordner was asking you some ques-  
2 tions about him?

3 A No, no.

4 Q Okay. Did you later give him more information with  
5 regard to Mr. Koury?

6 A Yes.

7 Q When did that occur?

8 A I don't know the exact date.

9 Q Okay, would you say your conversations escalated  
10 then, you talked to him more and more about Mr. Koury?

11 A Yes.

12 Q Okay. And what type of information were you giving  
13 him then?

14 A Well, Mr. Koury had stated to me that he would  
15 implicate me in any and all matters regarding drugs or any  
16 other illegal activity that he would be engaged in, that I  
17 was acting as his partner. And so I became worried.

18 Q When, do you recall when that occurred?

19 A On a number of occasions.

20 Q And did you tell Officer Cordner about that?

21 A Yes.

22 Q Do you remember when?

23 A I don't. I mean it's, you know, it's a repeated  
24 thing.

25 Q Okay. What else did you tell Officer Cordner?

1 A What else did I tell him?

2 Q Um-hum (yes), about Mr. Koury.

3 A Specifically? Help me, I don't know what you are,  
4 what?

5 Q How often did you talk to Officer Cordner about Mr.  
6 Koury just prior to the May 8th date when he was arrested?

7 A How often did I? Not hardly at all.

8 Q Okay, do you recall what kind of things you were  
9 telling him?

10 A Once they started an investigation, I did not speak  
11 to him at all. At that time I had to speak with Gary  
12 Caldwell. Dennis would not talk to me as a friend or other-  
13 wise.

14 Q Okay. And when did that happen?

15 A I don't know the exact day.

16 Q All right. And what kind of things did you tell  
17 Officer Caldwell?

18 A Oh, just, just different things, periods of time  
19 that Ron had been gone, and call up ranting and raving, and  
20 not taking his kids to school, and stuff like that.

21 Q Okay. Why were you giving him that information?

22 A Why? Because I had fear for my life.

23 Q Did you know that they were doing an investigation?

24 A Yes, ma'am, I did.

25 Q Okay. And what was your understanding of what was

1 A I don't recall.

2 Q Give me your best estimate.

3 A Oh, maybe eight or ten times. I have no idea.

4 Q And how many times do you think that you talked  
5 to Officer Cordner between 4 April and 8 May?

6 A I have no idea.

7 Q Give me your best estimate.

8 A Well, between 4th April and May, I did Detective  
9 Cordner's police car, which was involved in an accident, and  
10 his car was in my shop. So Detective Cordner would come by  
11 to check on the vehicle. So I would, during that period of  
12 time, I would have had cause to talk to him almost daily  
13 while I was working on his police vehicle.

14 Q And you talked about Koury, right? That wouldn't  
15 be the purpose of your conversation, but almost daily for  
16 that 34-day period you talked about Koury?

17 A No. It was kind of a joke, and he's still gone,  
18 I mean, it was not, he is present in the shop had become so  
19 un-often that it was a joke, when we seen him there working  
20 it was a special day.

21 Q Well, Cordner was anxious to know when he came  
22 back. Right?

23 A Not really. I didn't have any idea when Koury was  
24 coming back.

25 Q Now do you recall testifying on direct examination



1     some ten minutes ago that you never talked to Cordner from  
2     4 April until 8 May, cause Detective --

3     A           Not in regards to Koury.

4     Q           Let me finish my question.

5     A           Okay.

6     Q           Do you recall testifying a moment ago on direct  
7     examination that between 4 April, when you first told them  
8     about the cocaine and took some to the police, and 8 May,  
9     that you never talked to Detective Cordner after that?

10    A           Yes.

11    Q           It was all conversation with -- Caldwell?

12    A           Well, except for doing his car, you know. I mean,  
13    now that we have been sitting here recalling this period of  
14    time, it comes to light in my mind that during that period  
15    of time I fixed Detective Cordner's car.

16    Q           Okay, so would you like to change your testimony  
17    with regard to the conversations that you had before?

18    A           Yes. I would say that I would change my testimony,  
19    because while I was fixing Dennis' car I did have occasion  
20    to talk to him regularly; however, not about the Koury case,  
21    it was about his car.

22    Q           Now, the bird wasn't there, the parrot; Ron has a  
23    parrot, doesn't he?

24    A           Um-hum. (yes)

25    Q           The parrot wasn't there on the 8th of May, was it?